

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

CHAPTER 7 CASE

Shane M. Hendrix
SSN XXX-XX-6662
Jacqueline S. O'Connor-Hendrix
SSN XXX-XX-4774

CASE NO. 04-34520 DDO

Debtor.

NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY

TO: Debtor and other entities specified in Local Rule 9013-3(a).

1. Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation (hereinafter "Secured Creditor"), by its undersigned attorney moves the Court for the relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion on October 6, 2004, at 9:30 a.m., or as soon thereafter as counsel can be heard, before the Honorable Dennis D. O'Brien in Courtroom 228A of the above entitled Court located at U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than October 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or served and filed by mail not later than September 27, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Federal Rule of Bankruptcy Procedure 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on August 3, 2004. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rule of Bankruptcy Procedure 4001. This motion is filed under Federal Rule of Bankruptcy Procedure 9014 and Local Rules 9013-1 - 9019-1. Movant requests relief from the automatic stay with respect to property subject to a lien. Movant requests said relief be effective immediately notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3).

6. Debtor is indebted to Secured Creditor in the original principal amount of \$119,800.00, as evidenced by that certain mortgage deed dated October 24, 2002, a copy of which is attached hereto as Exhibit "A", together with interest thereon.

7. Debtor's indebtedness is secured by a mortgage on real estate in which Debtor has an interest as evidenced by that certain mortgage deed dated October 24, 2002, executed by Shane Hendrix, Jacqueline Hendrix FKA Jacqueline O'Connor, husband and wife as joint tenants, recorded November 8, 2002, as Document No. 140286, a copy of which is attached hereto as Exhibit "A". The name and address of the original creditor is contained in the attached Exhibit "A". The property is located in Dodge County, Minnesota and is legally described as follows to-wit:

The North ½ of Lot 5 and the North ½ of the East 14 feet of Lot 6, all in Block 6, Power's Addition to the Village, now City of Kasson.

Secured Creditor is now the holder of said mortgage and is entitled to enforce the terms thereof.

8. At all times material, Debtor was in default of the payments and performance of obligations to Secured Creditor.

9. Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. This Secured Creditor's interest in the property is not adequately protected where, as of September 7, 2004, Debtor is delinquent in the making of monthly payments as required for the months of December, 2003 through September, 2004, inclusive, in the amount of \$1,227.67 each; attorneys fees and costs of \$700.00. Debtor has failed to make any offer of adequate protection.

10. Debtor has no equity in the property and the property is not necessary to an effective organization. The value of the property as scheduled by Debtor is \$120,000.00 subject to Secured Creditor's

mortgage in excess of \$132,278.71.

Since this is a liquidation case, no reorganization is being attempted.

11. Secured Creditor desires to protect its interest in the aforementioned property and requests the Court to vacate the stay of actions and allow foreclosure pursuant to Minnesota law.

12. Secured Creditor has incurred and will incur legal fees and costs to protect and enforce its rights in the subject property.

WHEREFORE, Secured Creditor, by its undersigned attorney, moves the Court for an order for judgment that the automatic stay provided by 11 U.S.C. § 362(a) be modified so to permit the movant to commence mortgage foreclosure proceedings under Minnesota law and for such other relief as may be just and equitable.

Dated this 7th day of September, 2004.

WILFORD & GESKE

By /e/ James A. Geske

James A. Geske
Attorneys for Secured Creditor
7650 Currell Blvd., Ste 300
Woodbury, MN 55125
651-209-3300
Attorney Reg. No. 14969X

THIS COMMUNICATION IS FROM A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

140286

140286
 No. 3853
 Registration Tax Hereon Of \$ 275.54 Paid
 Date 11/12 2002
Luc B. Alberts Dep.
 County Auditor/Treasurer

OFFICE OF COUNTY RECORDER
 This instrument was filed in this office for recording on the _____ day of Nov A.D. 02 at 10:30 o'clock A and was duly returned
Luc B. Alberts
 COUNTY RECORDER
By: R9278 DEPUTY
Title One

GT-15-24-090 (8/00)
 Return To:

Conseco Finance
 Attn: Mail Stop T-314
 7360 South Kyrene Road
 Tempe, AZ 85283

MORTGAGE (With Future Advance Clause)

Application # 0210210183
 Loan # 6914966202

1. **DATE AND PARTIES.** The date of this Mortgage (Security Instrument) is October 24, 2002 and the parties, their addresses and tax identification numbers, if required, are as follows:

MORTGAGOR: Shane Hendrix, Jacqueline Hendrix FKA Jacqueline O Connor
 husband and wife as joint tenants

☐ If checked, refer to the attached Addendum incorporated herein, for additional Mortgagors, their signatures and acknowledgments.

LENDER: Conseco Finance Loan Company
 1970 Oakcrest Ave
 Suite 217
 Roseville, Minnesota 55113

T56270
TITLE ONE, INC.
 9201 East Bloomington Freeway
 Suite FF
 Bloomington, MN 55420

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, sells, conveys and mortgages to Lender, with the power of sale, the following described property:

Parcel ID: 24-506-0530
 See Exhibit A for full Legal Description.

The property is located in Dodge at _____
 (County)
102 Southwest 5th Street Kasson Minnesota 55944
 (Address) (City) (ZIP Code)

MINNESOTA - MORTGAGE (NOT FOR FNMA, FHLMC, FHA OR VA USE)

EX-100 © 1984 Bankers Systems, Inc., St. Cloud, MN Form 674-MTGLAZMN 8/27/2000

#111608

GT-15-24-090 (8/00) (page 1 of 6)

EXHIBIT A

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** ☒ Notwithstanding anything to the contrary herein, enforcement of this Security Instrument is limited to a predetermined debt amount of \$ 119,800.00 under chapter 287 of Minnesota Statutes. ☐ This Security Instrument secures an indeterminate amount and the mortgage registration tax will be paid according to chapter 287 of Minnesota Statutes. Additional amounts secured by this Security Instrument include interest and any other amount advanced by Lender in protection of the Property or this Security Instrument including but not limited to taxes, assessments, charges, claims, fines, impositions, insurance premiums, amounts due under prior or superior mortgages and other prior or superior liens, encumbrances and interests, legal expenses and attorneys' fees.

4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:

A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (You must specifically identify the debt(s) secured and you should include the final maturity date of such debt(s).)

Note dated October 24, 2002, between Conseco Finance Loan Company and Shane Hendrix, Jacqueline Hendrix, for \$119,800.00, maturing November 3, 2032.

B. All future advances from Lender to Mortgagor executed after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Mortgagor agrees that this Security Instrument will secure all future advances that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. All future advances are secured by this Security Instrument even though all or part may not yet be advanced. Nothing in this Security Instrument shall constitute a commitment to make additional future advances or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

C. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.

5. **PAYMENTS.** Mortgagor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.
6. **WARRANTY OF TITLE.** Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage, with the power of sale, the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.
7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:
- To make all payments when due and to perform or comply with all covenants.
 - To promptly deliver to Lender any notices that Mortgagor receives from the holder.
 - Not to allow any modification or extension of, nor to request any future advances under, any note or agreement secured by the lien document without Lender's prior written consent.
8. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.
9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
10. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor shall not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims and actions against Mortgagor, and of any loss or damage to the Property.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

JS

SH

EXHIBIT A

Legal Description:

The North 1/2 of Lot 5 and the North 1/2 of the East 14 feet of Lot 6, all in Block 6, Power's Addition to the Village, now City of Kasson.

Parcel ID: 24-506-0530

gt

S.H.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

CHAPTER 7 CASE

Shane M. Hendrix
SSN XXX-XX-6662
Jacqueline S. O'Connor-Hendrix
SSN XXX-XX-4774

CASE NO. 04-34520 DDO

Debtor.

**MEMORANDUM IN SUPPORT OF
MOTION FOR RELIEF FROM STAY**

ARGUMENT

I. CAUSE EXISTS FOR THE GRANTING OF RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)(1) WHERE THE INTEREST OF THIS SECURED CREDITOR IS NOT ADEQUATELY PROTECTED.

Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. Secured Creditor's interest in the property is not adequately protected where:

1. As of September 7, 2004, Debtor is delinquent for the monthly payments as required for the months of December, 2003 through September, 2004, in the amount of \$1,227.67 each; attorneys fees and costs of \$700.00.

2. Debtor has failed to make any offer of adequate protection.

II. THE AUTOMATIC STAY SHOULD BE MODIFIED PURSUANT TO 11 U.S.C. § 362(d)(2) WHERE (1) DEBTOR DOES NOT HAVE ANY EQUITY IN THE PROPERTY, AND (2) THE PROPERTY IS NOT NECESSARY TO AN EFFECTIVE REORGANIZATION.

The first requirement under § 362(d)(2) is met where the total of all the encumbrances against the property is in excess of the value of the property. The value of the property as scheduled by Debtor is \$120,000.00 subject to Secured Creditor's mortgage in excess of \$132,278.71.

Since this is a liquidation case, no reorganization is being attempted.

CONCLUSION

Secured Creditor is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) for cause, and where its interest in the secured property is not adequately protected. Secured Creditor is also entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) where Debtor has no equity in the property, and where the property is not necessary to an effective reorganization.

Secured Creditor respectfully requests an Order of this Court modifying the automatic stay consistent with the attached proposed Order.

Dated this 7th day of September, 2004.

WILFORD & GESKE

By /e/ James A. Geske

James A. Geske
Attorneys for Secured Creditor
7650 Currell Blvd., Ste 300
Woodbury, MN 55125
651-209-3300
Attorney Reg. No. 14969X

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

CHAPTER 7 CASE

CASE NO. 04-34520 DDO

Shane M. Hendrix
SSN XXX-XX-6662
Jacqueline O'Connor-Hendrix
SSN XXX-XX-4774

**AFFIDAVIT OF
JOHN TIMSON**

Debtor.

John Timson, being first duly sworn on oath, deposes and states:

1. That he is the Bankruptcy Specialist of Select Portfolio Servicing, Inc.
2. Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation, is now the holder of a mortgage on real property in which the debtor has an interest. The debtor's indebtedness is evidenced by that certain mortgage deed dated October 24, 2002, executed by Shane Hendrix, Jacqueline Hendrix FKA Jacqueline O Connor husband and wife as joint tenants, recorded November 8, 2002, as Document No. 140286. The property is located in Dodge County, Minnesota and is legally described as follows, to-wit:

The North 1/2 of Lot 5 and the North 1/2 of the East 14 feet of Lot 6, all in Block 6, Power's Addition to the Village, now City of Kasson.

3. That he has reviewed the account records relating to the Hendrix's mortgage loan, account no. 0004142451.
4. That as of August 27, 2004, the following amounts were owing on this account:

Unpaid Principal:	\$119,353.16
Interest through August 27, 2004	11,644.95 11,617.82 JT
Attorney's Fees:	700.00
Property Inspections:	57.50
Foreclosure Fees and Costs:	1,066.20
BPO:	65.00
Non-Escrow Advances:	592.50
Other Fees:	13.23

TOTAL:

~~\$133,514.54~~
\$132,278.71 JT

5. That the mortgage loan is delinquent for monthly mortgage payments for the months of December, 2003 through August, 2004 in the amount of 1,227.67 each.

6. This affidavit is given in support of the motion of Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation for relief from the automatic stay.

SELECT PORTFOLIO SERVICING, INC.

By

John Timson

Its Bankruptcy Specialist

Subscribed and sworn to before me
this 31st day of August, 2004.

Notary Public

Notary Seal

Verdine A. Freeman, Notary Public
City Of Philadelphia, Philadelphia County
My Commission Expires Sept. 17, 2006

Member, Pennsylvania Association Of Notaries

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SSN XXX-XX-4774

CASE NO. 04-34520 DDO

Debtor.

**UNSWORN DECLARATION
FOR PROOF OF SERVICE**

Joanna Cheyka, employed by Wilford & Geske, attorneys licensed to practice law in this Court, with office address at 7650 Currell Blvd., Ste 300, Woodbury, Minnesota, declares that on September 7, 2004, I served the annexed Notice of Hearing and Motion for Relief from Stay, Memorandum in Support of Motion for Relief, Affidavit of John Timson, and proposed Order to each person referenced below, a copy thereof by enclosing the same in an envelope with first class mail postage prepaid and depositing the same in the post office at Woodbury, Minnesota addressed to each of them as follows:

Shane M. Hendrix
Jacqueline S. O'Connor-Hendrix
102 Fifth Street SW
Kasson, MN 55944

Michael S. Dietz
505 Marquette Bldg
PO Box 549
Rochester, MN 55903

Thomas W. Healy
Healy Law Offices, PA
119 6th St SW
Rochester, MN 55902

U.S. Trustee
1015 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated this 7th day of September, 2004.

/e/ Joanna Cheyka
Joanna Cheyka

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

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CHAPTER 7 CASE

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SSN XXX-XX-6662
Jacqueline S. O'Connor-Hendrix
SSN XXX-XX-4774

CASE NO. 04-34520 DDO

Debtor.

ORDER

The above entitled matter came on for hearing upon motion of Select Portfolio Servicing, Inc. f/k/a Fairbanks Capital Corporation (hereinafter "Secured Creditor"), pursuant to 11 U.S.C. § 362 on October 6, 2004, at U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED that Secured Creditor, its assignees and/or successors in interest, is granted relief from the stay of actions imposed by 11 U.S.C. § 362 with regard to that certain mortgage deed dated October 24, 2002, executed by Shane Hendrix, Jacqueline Hendrix FKA Jacqueline O'Connor, husband and wife as joint tenants, recorded November 8, 2002, as Document No. 140286 covering real estate located in Dodge County, Minnesota, legally described as follows, to-wit:

The North ½ of Lot 5 and the North ½ of the East 14 feet of Lot 6, all in Block 6, Power's Addition to the Village, now City of Kasson

and may pursue its remedies under state law in connection with the subject note and mortgage deed.

Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this Order is effective immediately.

Dated: _____

Judge of Bankruptcy Court